Pinkerton's, Inc. and Local No. 71, International Guards Union of America. Case 9-CA-18038

27 April 1984

DECISION AND ORDER

By Chairman Dotson and Members Hunter and Dennis

On 29 June 1983 Administrative Law Judge Robert G. Romano issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the Administrative Law Judge is adopted and the complaint is dismissed.

DECISION

STATEMENT OF THE CASE

ROBERT G. ROMANO, Administrative Law Judge. This case was heard at Louisville, Kentucky, on July 22, 1982.1 The charge was filed by Local No. 71, International Guards Union of America (herein Local 71), on February 22 against Pinkerton's, Inc. (herein Respondent Employer). Complaint thereon issued on March 25 alleging violations of Section 8(a)(1), (3), and (5) of the Act. Respondent Employer filed a timely answer on March 29 denying the commission of any unfair labor practices. At the opening of hearing Employer moved for Board deferral of the complaint allegations of unfair labor practices in deference to a certain arbitrator's opinion and award that issued on June 22, and accordingly it requests that the complaint herein, in its entirety be dismissed by the Board. The General Counsel and the Charging Party on several asserted grounds contend deferral is inappropriate. The case has also presented certain deferral procedural questions and certain substantive complaint allegation issues.

On the entire record one (essentially) fully stipulated, and after consideration of the briefs filed by the General Counsel, the Charging Party, and Respondent Employer about August 26, I make the following

FINDINGS OF FACT

1. JURISDICTION

Pinkerton's, Inc., a Delaware Corporation, is engaged in the business of furnishing guard services to customers located in various States, including the State of Kentucky, where Employer has a branch office and place of business located in Louisville. During the past 12 months, in the course and conduct of its business operations, Pinkerton's, Inc. has performed services valued in excess of \$50,000, in States other than the State of Kentucky. The complaint alleges, the Respondent by answer admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 71 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE ISSUES

A. Background

1. The Board certifications

International Guards Union of America (Independent) was initially certified by the Board in Case 9-RC-3389 on December 11, 1958, as the collective-bargaining representative of employees in an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. As alleged in the complaint and admitted in answer, the unit consists of:

All guards employed by Respondent out of its Louisville, Kentucky branch office, but excluding auxiliary guards, all other employees, and all supervisors as defined in the Act.

On April 11, 1966, Louisville Guards Union, Local #71, International Guards Union of America was (last) certified by the Board in Case 9-RM-419 as the exclusive representative of all employees employed in the following appropriate unit:

All guards of the Employer employed by its Louisville, Kentucky Branch Office, including regular part-time guards and sergeants; but excluding all other employees, including office clerical employees, professional employees, investigators, auxiliary guards and supervisors as defined in the Act.

The underlying Decision and Direction of Election in Case 9-RM-419, dated March 4, 1966, recites in fn. 2, inter alia: "From its Louisville, Kentucky branch office, the Employer has guards working in Louisville, Lexington, Shelbyville, and Owensboro, Kentucky."

2. The collective-bargaining history

The complaint alleges and Respondent Employer by answer admits that at all times since December 11, 1958,

¹ While we agree with the judge's finding that deferral to the arbitrator's decision is appropriate, we have examined this proceeding in light of the standards for deferral recently propounded in Olin Corp., 268 NLRB 573 (1984). In so finding, we specifically agree with the judge that this case does not present questions of representation, accretion, or appropriate unit concerning which the Board consistently has refused to defer. See, generally, Williams Transportation Co., 233 NLRB 837 (1977), and cases cited therein. Rather, we find, in agreement with the judge, that the controversy in issue essentially is one of contract interpretation.

¹ All dates are in 1982 unless stated to the contrary.

the Union by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all guards employed by Employer out of its Louisville Kentucky branch office (with stated exclusions); that the Union and Respondent Employer since that time have been parties to successive collective-bargaining agreements covering the employees in that unit; and that the most recent agreement is one effective from November 14, 1980, through November 13, 1983.²

3. The substantive complaint allegations

The substantive factual allegations of unfair labor practices are contained in paragraphs 5 and 10 of the complaint. Complaint paragraph 5 alleges that about January 3 Respondent Employer refused to recall from layoff five named employees (Harold Young, Stanley A. Webster, Charles J. Brown, Kenneth Hilton, and Bennie Bramlett) because they had joined, supported or assisted Local 71 and had engaged in concerted activity for the purposes of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection and/or because the said employees would not agree to give up their union membership. Complaint paragraph 10 alleges that about January 3 Respondent Employer unilaterally withdrew its recognition of Local 71 as the collective-bargaining representative of employees who work in Lexington, Kentucky, with concurrent allegations specifically made therein that Lexington, Kentucky, is within the territorial jurisdiction of the above-appropriate unit; that employees who work in Lexington have been represented by the Union since December 11, 1958; and that they have been covered by the successive contracts that have existed between the par-

The General Counsel has specifically urged in brief that it be found herein that the Respondent has violated Section 8(a)(3) and (1) of the Act by having failed to recall the five named employees from layoff, because of their union activities. The General Counsel also contends in brief that Respondent has violated Section 8(a)(5) and (1) of the Act by its unilateral withdrawal of recognition of the Union as the collective-bargaining representative of its employees who work in Lexington, Kentucky. Complaint does not contain a conclusionary allegation of the conduct alleged in paragraph 5 being in violation of Section 8(a)(3) and (1) as it does of the conduct alleged in paragraph 10 being in violation of Section 8(a)(5) and (1) (and 8(a)(3)). Nonetheless, in light of the adequacy of the notice first given the Respondent by the nature of the specification of the substantive factual allegations contained in paragraph 5(a) and (b) of the complaint brought against it, and in view of colloquy and/or arguments as otherwise expressed at hearing, but particularly the positions as last advanced in brief by the parties for

contended ultimate findings, I am satisfied that conclusion is warranted herein that the Respondent received adequate notice from the complaint as to the General Counsel's contention that the refusal to recall the five named employees from layoff was contended to be discriminatory, and thus concludable on the facts alleged as placed in issue as being violative of Section 8(a)(3) and (1) of the Act, and that the parties, in substance and effect, so recognized and have joined issue thereon. I shall henceforth proceed to disposition of the complaint allegations and raised deferral issues, accordingly.³

Employer has denied that it violated Section 8(a)(3), (5), and (1), in any of the above respects; and its answer has notably included denial of the complaint allegation that contained assertion of Lexington, Kentucky, as being within a territorial jurisdiction of the above-appropriate unit.

As conceded, urged, by answer at hearing or in brief, Respondent Employer does not deny that its guard employees who had worked in Lexington up until December 31, 1981, had been theretofore employed out of Louisville or that all of its guards employed out of Louisville were (and are) represented by the Union; and, as well, it acknowledges that guards working out of Louisville, in Lexington, were always theretofore covered by the successive contracts that have existed between the parties. However, Employer contends that the last of those employees (the five employees named above) were laid off by Employer's Louisville branch office, by whom they were employed, on December 31, 1981, at the time when Employer's Louisville branch office, which regularly had separately bid on its own work and in the past few years had seen its guard service work in Lexington decline for competitive reasons, lost its last guard service contract work (for P. Lorillard) in Lexington. Employer asserts Louisville was unsuccessful in any more activity in Lexington. Employer thus essentially contends that it has not refused to recall any of those employees from layoff, but rather that their employer, the Louisville branch office does not presently have any other contracts to provide guard service (thus work) in Lexington, Kentucky; nor, it asserts, has it withdrawn recognition from the Union as their collective-bargaining representative.

In contrast with the General Counsel's and the Charging Party's basic contention, essentially that any of Pinkerton's, Inc.'s guards who are employed in Lexington are represented by the Union, Employer contends rather that the guards who have commenced working in Lexington, Kentucky, in early January, and who are currently working in Lexington, are employed out of its (non-

² Although complaint recited termination date of current agreement as being November 13, 1981, the submitted current agreement by its terms reflects duration extends through November 13, 1983. The General Counsel has moved, without opposition, to correct inadvertent error in complaint issuance in that respect; and in light of the above showing of record that motion is granted.

Thus the instant matter is more clearly governed by Board holding in Meilman Food Industries, 234 NLRB 698, 699 fn. 4 (1978), than by holding of Florida Steel Corp., 224 NLRB 45 fn. 2 (1976). See and compare Kraft Foods, Inc., 251 NLRB 598 fn. 4 (1980). Finally, I do not view as material to the resolution of the issues herein, the filing of an earlier 8(a)(1) and (5) charge in Case 9-CA-17907 against Employer by the Union on January 25, nor of Regional Director disposition (dismissal) letter, as first presented by Employer by attachment to brief, where instant charge and complaint in Case 9-CA-18308 were, respectively, timely filed and issued and clearly present issues for Board addressment and resolution, or deferral to arbitrator opinion and award. See and compare Winer Motors, 265 NLRB 1457 (1982).

union) Cincinnati, Ohio branch office on different, new guard service work (for Brown & Williamson) that its Cincinnati branch office, which assumed control of Lexington effective May 1, 1981, had been able to thereafter successfully bid competitively and been awarded and which very work its Louisville branch office was unable in past years to retain or interimly retrieve for competitive price reasons. Thus the employees presently working in Lexington, Kentucky, Employer contends, are no longer employed out of its Louisville branch office for lawful economic reasons.

All of which, it is contended by Employer, was specifically previously found by an arbitrator, on a full record made by the parties in certain binding arbitration, to have occurred for legitimate business reasons; and, as well, for nondiscriminatory reason, as was contended by Employer (at hearing), was also *implicitly* found by the arbitrator, and to which decision the Employer would now have the Board defer.

B. The Deferral Issues Presented.

1. The Respondent's motion

At the opening of the hearing on July 22, Respondent Employer filed a motion of Pinkerton's, Inc. to dismiss complaint in deference to an arbitrator's decision under authority of the Board's prior holding in Spielberg Mfg. Co., 112 NLRB 1080 (1955); or, alternatively, under an (contended) authority of Amoco Texas Refining Co., 251 NLRB 1528 (1980), moved for a ruling that the record of arbitration proceedings be ordered as one binding on the parties, and for further order that the parties thereupon brief only the legal issue of whether the arbitrator's award of June 22, is clearly repugnant to the Act, based on said record (alone). Employer submitted in support a copy of the arbitration record, consisting of transcript of the arbitration proceeding, the exhibits (including the two specific grievances that were arbitrated, and copy of the current collective-bargaining agreement providing for binding arbitration), and the complete text of the arbitrator's opinion and award. The arbitration record as originally submitted did not include the parties' briefs that had been submitted to the arbitrator. At hearing the Employer also argued in support of its motion that a comparison of the complaint's allegations with the arbitrated grievances will reveal that the substantive issues of complaint are identical to those already decided by the arbitrator under the binding arbitration. (In passing it is observed that at hearing Employer not only contended the issues were identical, but that the evidence bearing thereon was to be exactly the same.)

2. The arbitrated grievances

The first of said grievances, filed by Harold L. Young on January 1, reflects essentially that the nature of Young's complaint was that Young claimed that he had been illegally laid off from Pinkerton's, Inc. Louisville branch office at a time when Pinkerton's, Inc. had other locations (work) in the Lexington area to which Young felt he could have been assigned; and that Young specifically grieved that he thought he should have been transferred to perform guard service work at the Brown and

Williamson Tobacco Company in Lexington, as he had more seniority than any guard presently working there.

The second of the two arbitrated grievances (herein the Union's grievance) was filed by the Union's business agent, Charles Roth on January 3 with complaint therein registering essentially: (1) that the Union viewed certain conduct of Employer as illegal, namely in respect to the information given to Roth by Davis W. Liverett, Louisville branch office manager, in December 1981 that it was losing the last operation it had in Lexington on January 1, and that ". . . any future operations in the Lexington area serviced by Pinkerton's Inc. would be conducted out of their Cincinnati Office"; (2) urging that certain union-security provisions of the contract should be applied to the employees working in Lexington or a violation of contract would be construed; and notably (3) with the Union raising specific contention based on the Board's prior certification of the Union as an exclusive bargaining representative in advancing claim: "We also feel that Pinkerton's is in violation of National Labor Relations Ruling dated March 4, 1966, Case 9-RM-419 that specifically includes the Lexington area as one represented by Local #71 International Guards Union of America.

3. The Spielberg deferral issues refined

In Spielberg, supra, after first holding that the Board was not bound as a matter of law by an arbitration award,4 the Board then indicated its deferral to such an award would nonetheless be appropriate where the arbitration proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. The Board in Spielberg dismissed an 8(a)(1) and (3) complaint in its entirety, finding the employer had not violated the Act when, in accordance with the award, it had refused to reinstate four strikers. Notably, the Board had first concluded in that case that the award was not at odds with the statute, significantly also stating that in doing so, that did not mean that the Board would necessarily have decided the issue of alleged striker misconduct as the arbitration panel did, specifically stating it did not pass on that issue. Rather upon its finding that the above-enumerated conditions precedent for an appropriate deferral were present the Board therein stated what would appear as a hallmark expression of its underlying policy for a Spielberg deferral, namely that: "In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award," id. 802; and with parameters of the appropriateness of such a deferral on other early occasion expressed by the Board as being to defer in cases: ". . . where it can do so without abandoning its obligations to protect rights which the Act guaranteed to employers, bargaining representatives, in-

⁴ Neither is the Board mandated by the Act to exercise its plenary power over unfair labor practices in all situations, *Monsanto Chemical Co.*, 130 NLRB 1097, 1098 (1961).

dividual employees, or the public." Monsanto Chemical Co., 130 NLRB 1097, 1098-1099 (1961).

General Counsel readily acknowledged, as was urged by the Employer, that the Board's policy of nondeferral in cases involving allegations of 8(a)(3) in Collyer type cases, 5 as expressed in General American Transportation Corp., 228 NLRB 808 (1977), did not extend to effect, or disturb, the Board's earlier pronounced Spielberg deferral doctrine, convincingly shown by the parties as a policy continued by the Board.6 the General Counsel would appear to as readily concede in brief that upon the stated conditions being shown present for a Spielberg deferral, that no material distinction need then be made as to whether the unfair labor practice issue to be appropriately deferred to arbitration be one involving 8(a)(1), (3), or (5) complaint allegation. However, a Spielberg deferral is appropriate, so principally contends the General Counsel, only after there has been a scrutiny of the arbitration proceedings and the arbitrator's decision first made by the Board to determine that all the Spielberg standards for deferral are present. In that respect the General Counsel would paramountly rely on the additional Board developed requirement that for a Spielberg deferral the arbitrator must have considered the unfair labor practice issue in the decision. Employer contends that the arbitrator did consider the unfair labor practices alleged herein. The General Counsel and the Charging Party contend to the contrary. In support of their respective claims as to presence, or absence, of the required consideration by the arbitrator of the unfair labor practices alleged herein, the parties have (collectively) advanced for precedential guidance, though with controverted applications, prior Board holdings in Raytheon Co., 140 NLRB 833 (1963); Kansas City Star Co., supra; Pacific Southwest Airlines, supra; Atlantic Steel Co., supra; Suburban Motor Freight, 247 NLRB 146 (1980); and American Bakeries, supra.

Preliminarily, it is thus generally to be observed that it is apparent on analysis of the multiple party contentions hereinafter reflected, that the parties have essentially joined issue on various deferral aspects of whether or not, under existing Board precedent, the unfair labor practices alleged in complaint were previously presented to, considered by, and adequately indicated ruled on by the arbitrator; and whether, or not, the arbitrator's award itself is one to be regarded in certain respects repugnant to the purposes, or policies of the Act.

4. The arbitrator's findings and conclusions

The arbitrator essentially found (though not necessarily in order shown) that Pinkerton's, Inc. operates from branch offices; with additional conclusion made that there was nothing in the evidence to suggest that the parties did not deal with each other on the basis that their respective rights and duties grew out of the fact

Collyer Insulated Wire, 192 NLRB 837 (1971); Roy Robinson Chevrolet, 228 NLRB 828 (1977).

and the assumption that the Company had business in various geographical areas. The arbitrator further found that during recent years the competitive position of the Louisville branch office had diminished; that it had lost its accounts one by one in Lexington, until in 1981 its only active contract was P. Lorillard; that that company had given notice of termination of contract effective December 31, 1981; that the competition was generally nonunion, which had placed the unionized Louisville branch office at a competitive disadvantage in bidding on jobs in the Lexington area; that all of the latter's former accounts ". . . were lost due to competitive bidding (i.e. lower price offered by competition for substantially equivalent service)"; that it was in an attempt to deal with the Louisville branch office's deteriorating business base that Manager Liverett during 1980 contract negotiations had proposed to the Union that some accounts (inter alia Lexington) be staffed by nonunion guards, which proposal was rejected by the Union and did not become part of the contract.

The arbitrator also found that during May 1981, as part of an attempt to deal with the Lexington situation, the national office had decided to transfer Lexington from the territory of the unionized Louisville branch office to the nonunion Cincinnati branch office; that originally Louisville branch office guards (at P. Lorillard) were scheduled to be transferred to Cincinnati branch Office, but they had remained employees of the Louisville branch office until that contract had ended; that the Cincinnati branch office (in the interim) had successfully bid on a job for Brown & Williamson in Lexington on a low bid basis and for a price that the Louisville branch office could not match; that the Louisville branch office had been unsuccessful in retaining or retrieving that contract; that prior to layoff grievant Young, because of seniority, had been offered a job in Louisville branch office's closest facility at Burgin, Kentucky, and that the others were offered similar jobs, but all had declined; and that Young and the Union were aware of what was going on in that the Louisville branch office had also discussed the possibility of Young being hired by the Cincinnati branch Office as a nonunion guard to work at Brown & Williamson, but that possibility was also declined by Young, Roth, and the Union on contention that Lexington was union territory; that the Cincinnati branch office began the contract at Brown & Williamson, effective January 1, and that company evidence was that if the work in Lexington for Brown & Williamson were to be awarded to Louisville, and its rates applied, the rate to Brown & Williamson would be raised, and that contract inevitably lost.

With regard to union claim that Lexington belonged to the Louisville branch office based on certification, past practice, and the contract, the arbitrator's stated view of the footnote (in the Decision and Direction of Election) was that the footnote was descriptive of the then extent of the company business; that to read more into it would not be realistic; that business changes, and that a description of the business is (consequently) subject to change; and that on a union (pressed) argument that the arbitrator must determine whether Lexington

Kansas City Star Co., 236 NLRB 866, 867 fn. 3 (1978); Pacific Southwest Airlines, 242 NLRB 1169 (1979); Atlantic Steel Co., 245 NLRB 814 (1979); and American Bakeries Co., 249 NLRB 1249 (1980).

⁷ The Board has a policy of nondeferral in 8(a)(4) matters, a consideration noted by Employer as not involved herein. Cf. Filmation Associates, 227 NLRB 1721 (1977); United States Steel Corp., 264 NLRB 76 (1982).

was an area covered by the certification(s), the arbitrator's stated judgment was that the most that can be said about the territories or cities named in them is that the Union has jurisdiction to the extent that the Louisville office continues to have business in them.

The arbitrator also found that the Louisville branch office tried in good faith to retain contracts in Lexington but the prevailing economic conditions had worked against its efforts; that the loss of business took place because of those conditions, rather than company caprice; that with regard to past practice, if there was a practice here, it was a practice of union employees serving in cities where the Louisville branch office had contracts for guard services; and that with regard to the additional argument b raised by the Union that the arbitrator should not give the Company what the Company did not get in negotiations, that the Louisville branch office did not have any nonunion business; and that the reaction of the national office to do something about the loss of the Lexington business by the Louisville branch office was not an arbitrary, capricious, or unreasonable action; and in connection with which, the arbitrator made additional findings:

Nor was anyone in the Louisville branch office discriminated against by the action of the national office. In my judgment the Lexington business area was substantially and effectively gone for the Louisville branch office at the time the national office acted.

The arbitrator, in conclusion, found that there was no demonstration of a contract violation; that grievant Young was properly laid off; that the Union's grievance did not present a case on which relief can be granted; and that in the absence of a proven contract violation, there can be no relief granted. The arbitrator thereupon denied both grievances.

5. The deferral issues as raised by the parties

a. The parties' contentions

(1) Employer's initial contentions

Employer initially submitted a memorandum in support of its motion in which it had argued that all the (basic) Spielberg deferral conditions were present, and with additional assertions made by it that the substantive issues of complaint are identical to those decided by the arbitrator in the binding arbitration, as provided by the contract; and with argument made therefrom that the arbitrator had rejected the specific claims of the Union previously made that Louisville branch office employees were "improperly" laid off because Employer had guards working in Lexington; had rejected the claim of the Union that Lexington is their "territory," and rejected the Union's claim that the Employer had refused to bargain regarding assignments in Lexington. Employer contends that inasmuch as the arbitrator's decision is one founded upon (with findings on) recognition and jurisdiction language of the collective-bargaining agreements since certification, Employer's economic/business justifications shown, and absence of any motive to erode the

bargaining unit, the arbitrator's decision is not one here to be found by the Board as clearly repugnant to the purposes of the Act. Employer advanced a reliance (seemingly particularly insofar as an 8(a)(3) allegation relates) on Board holding in Ingersoll Ran, Co., 247 NLRB 801 (1980), with Employer contention thereon that: "Sound Board authority holds that an employer is not guilty of an unfair labor practice where its actions are in response to legitimate economic necessities, and are not motivated by antiunion animus." Employer contends that this is not a relocation or transfer of work case. Employer also advanced, insofar as an 8(a)(5) allegation, and presumably thereby seeking a compared reliance (or extension) of Board holding of no 8(a)(5) violation shown where a "Double Breasted" employer did not engage in deception, or transfer work from a union company to a nonunion company, to its own reassignment of Lexington from its (union) Louisville branch office to its (nonunion) Cincinnati branch office, under the circumstances shown there, including (as argued present also herein) where the Union had always lived by jurisdictional language in contract (viz. representing those guards employed by or out of Louisville), urging on that point to see A-1 Fire Protection, 233 NLRB 38 (1977), remanded 600 F.2d 918 (D.C. Cir. 1979), reaffd. 250 NLRB 217, 219 (1980).

(2) Contracontentions of the General Counsel and the Charging Party

It was readily acknowledged at hearing, and remains uncontested by the General Counsel and Charging Party Union, that pursuant to provisions for binding arbitration under the parties' current contract an arbitration hearing was held on the above Young and union grievances; that the proceedings conducted thereon were fair and regular; and that on June 22, the impartial arbitrator designated by the parties thereto, had issued an Opinion and Award in which the arbitrator denied the above two grievances. However both the general Counsel and the Charging Party at hearing, after review of the arbitration record (as then) advanced, following recesses granted for such purpose,8 nonetheless contended that the Board should not defer the present complaint allegations to the arbitrator's prior opinion and award. Essentially the contentions then and now urged are: that the arbitrator had been earlier presented with a contractual issue; that the arbitrator's decision had turned strictly on contractual interpretations; and that the arbitrator did not directly address the statutory unfair labor practice issues that are presently before the Board. Both the General Counsel and the Charging Party in their briefs have continued to advance this basic contention in that they assert from a review of the arbitrator's decision it is clear that the arbitrator addressed the issues raised by the grievances solely on the basis of a potential contract violation, or in a context of whether or not Pinkerton's, Inc. had violated the collective-bargaining agreement. In support thereof, both

The General Counsel's preliminary cross-motion for an adjournment beyond the day was denied.

essentially would specifically rely on certain arbitrator statements, namely:

(a) Opening paragraph of arbitrator's opinion in which the arbitrator stated:

The two grievances are inter-related. They both concern the failure of Pinkerton's, Inc. to assign bargaining unit employees to perform guard services in the Lexington, Kentucky area. Pinkerton's, Inc. would assign bargaining unit employees from its Louisville Branch Office to perform such services if that office had contracts in Lexington. The inquiry here is whether the grievants have any recognizable contract rights to guard service contracts held by the Cincinnati Branch Office of Pinkerton's, Inc. in the Lexington Area. I have considered all of the arguments made on behalf of the Grievants, but I am not persuaded that under the circumstances the Grievants have any contract right to be assigned to guard service work being performed in the Lexington area by the Cincinnati Branch Office. My holding is a narrow one and should be thought of as applying to the facts of this case only.

(b) Statement of arbitrator (following his stated judgment as to the import of the certification documents):

There can always be a question concerning the cause of the loss of business and whether or not any arbitrary, capricious or unreasonable company acts took place to cause the loss, but in the absence of more definitive contract language dealing with the problem in this case and in view of my finding that the loss of business took place because of prevailing business conditions rather than because of Company caprice, it is my judgment that there is no basis for finding a contract violation.

(c) The arbitrator's concluding statement:

In conclusion, there was no demonstration of a contract violation. Grievant Harold Young was properly laid off. The grievance of Charles Roth, Sr. does not present a case on which relief can be Granted. In the absence of a proven contract violation, there can be no relief granted.

Both the General Counsel and the Union (in briefs) would have it relatedly observed (and are accurate of record in advancing such contention) that there was no reference by the parties in the arbitration transcript to a pendency of unfair labor practice charges, nor that a complaint had issued relating to the matters involved in the arbitrated grievances. Both further argue that review of the transcript also reveals that the Union and Employer had themselves framed the issue presented to the arbitrator, early in the arbitration proceeding, as within the context of the contract. The record reveals they did so respectively, as follows:

(a) by Union counsel:

. . . And so that it is now presented to you for determination. And that determination will be the question of whether or not the Company does have a contractual obligation, can the Company, in light of whatever the facts are developed here today, take a unilateral position that they are not obligated, that this Contract doesn't cover people that are working for the Pinkerton Company's Cincinnati Office and that by some administrative fiat restructuring within themselves, the Company can avoid the effect of it's [sic] contractual obligations.

Again in passing it is however observed that the arbitrator's recitement of the Union's position identified a contention was also advanced on certification, viz.: "We believe that the Arbitrator must determine whether or not Lexington is an area covered by the certification, the collective bargaining history and the contract."

(b) By Employer counsel:

Because the issue really, as we see it, is, can the Union change the Contract language, and the certification from an Agreement covering people working out of the Louisville office to an agreement covering people working out of any office of Pinkerton in one of the Kentucky or Indiana, I suppose, areas which historically had been served out of the Louisville office. And just by stating it, I demonstrate that that is just not what the Contract or the certification has to say.

It was, and is also specifically, urged by the General Counsel that the arbitrator did not address the 8(a)(3) allegations of the complaint in that he did not deal with, or was silent as to the (alleged) unlawful, antiunion motivations with regard to Employer's decision to transfer the operations in Lexington from the authority of the (union) Louisville branch office to that of the nonunion Cincinnati branch office; and that since the arbitrator did not directly address these issues and since a failure on the part of the arbitrator to consider these issues would render the arbitrator's decision repugnant to the Act, the Board, accordingly, should not defer in these matters.

(3) Employer's cross-contentions

At hearing Employer immediately countered that under established Board doctrine an arbitral decision does not have to specifically refer to the provisions of the Act in order to be appropriate for deferral in terms of whether an arbitrator has adequately considered the issues that are presented by a complaint; and with Respondent Employer advancing in support thereof prior Board holdings in Atlantic Steel Co., 245 NLRB 814 (1979); and Kansas City Star Co., 236 NLRB 866 (1978). Thus Employer argued that in Kansas City Star Co., supra, the Board explained that a deferral is proper if the arbitrator has "made factual findings regarding [the statutory issue]." Id. at 867. Employer would specifically rely on the expression by Member Truesdale as cogent tin that regard, in separate concurring opinion, as expressed by Employer in brief.

While the arbitrator did not pass on the legality of the [statutory issue], he was required to rule on every factual and legal question necessary to the resolution of this issue.

. . . .

Thus, my decision to concur [in deferring to the Arbitrator's decision] rests on the unique relationship between the issues decided and the one omitted—since all the factual and legal findings necessary to the resolution of the 8(a)(5) allegation . . . were also necessary to a determination of the legality of the [arbitrated actions]. These issues were vigorously litigated before the arbitrator, and he reached his decision on the basis of a full record. No more is required. [Id. 869.]

(Italics and paraphrasing of omissions appears above as supplied by Employer.)

Employer also contends that in the Atlantic Steel Co., case, supra, where the administrative law judge had refused to defer because (as the General Counsel has argued here): "[T]he arbitrator confined his decision to issues arising under the contract and failed to consider whether the conduct amounted to an unfair labor practice." The Board, relying on the Kansas City Star case, supra, did defer, again stating:

[I]t is necessary only that the arbitrator has considered all the evidence relevant to the unfair labor practice in reaching his or her decision.

[T]he Board recognized that the Spielberg doctrine could be satisfied where the arbitrator's decision implicitly resolved the unfair labor practice. [245 NLRB at 815 (emphasis in original).]

In further contravention of the argument that the arbitrator did not consider an unlawful antiunion motivation claim, Employer also advanced reliance on: (a) a certain statement made by the Union previously to arbitrator (in its brief to arbitrator), "Yet here Pinkerton's asks the arbitrator to ignore its obvious antiunion purpose in unilaterally reassigning the Lexington area to the Cincinnati Office and to approve the Company's attempt to avoid its legal and contractual obligations to this Union"; and (b) a (related) statement of arbitrator, as at outset included in union position, that, "A unilateral administrative determination cannot, therefore, defeat Pinkerton's legal and contractual obligation"; and with Employer's argumental contention made thereon that the term legal had reference to rights under the Act. 10 From the latter, in

combination with the additional finding of arbitrator expressed in opinion, "In this case, I find that the Louisville Branch Office tried in good faith to retain contracts in Lexington, but prevailing economic conditions worked against its efforts"; and with general reference to other supportive findings made by the arbitrator that the reason for the Company's action was economic, Employer has argued essentially, that by virtue of the other reasons that were presented (by the Union) to the arbitrator, by implication, the arbitrator found that there was not any motivation (on the part of Employer) to get out from under the obligations of its contract.

It was early observed that the only apparent reference specifically to "discrimination" in the opinion and award is found in statement by arbitrator in opinion, "Nor was anyone in the Louisville Branch Office discriminated against by the action of the National Office." Employer argued at hearing (in combination with the above), that is enough under Atlantic Steel Co., supra. Indeed Employer has now advanced argument in brief that Board holdings in the latter and Kansas City Star Co., supra, mandate such a deferral. In brief, Employer would also have related standard for the close review of award be (directed) as to the showing made, ". . . that the findings of the arbitrator support his conclusions and demonstrate that he considered and rejected the contentions of the General Counsel," Pacific Southwest Airlines, 242 NLRB 1169, 1170 (1979); that an observance also be made herein of Board holding in American Bakeries, 249 NLRB 1249 (1980) that, in the review to be made of the record "differing inferences . . . do not warrant a de novo review of the evidence;" and urges (presumably as part of the due deference) an acceptance of arbitrator statement, "I have considered all of the arguments made on behalf of the grievants . . ." as a confirmation of the latter's consideration of all union arguments raised. 11

(4) Additional contentions of the General Counsel and Local 71 that there was not adequate indication of a ruling by the arbitrator on the unfair labor practices alleged herein

At hearing the General Counsel contended that the Atlantic Steel Co., case, supra was itself readily distinguishable because the arbitrator had there found that the protected concerted activity of the individual played no part in his discharge; thus making a finding that would clearly underpin the unfair labor practice analysis and finding of the Board supporting deferral. In contrast the General Counsel argued that the arbitrator in the instant matter really did not treat the Employer's antiunion motivation beyond the factual recitation that there had been a transfer of the work in the Lexington area from the unionized Louisville office to the nonunion Cincinnati office. The General Counsel supports position taken at hearing that the arbitrator did not sufficiently consider the unfair labor practice issues with arbitrator basic stated reliance placed in brief on the Board's later holding in Suburban

⁹ As to the excerpt from union brief submitted to arbitrator, by supplemental stipulation (discussed infra), the briefs submitted by the parties to the arbitrator were subsequently made part of the record. The above statement from union brief is found therein as the third of a three-sentence paragraph, with prior sentences thereof equally notably providing: "It is well established that an employer's desire to escape a financial burden resulting from the collective-bargaining process is not an adequate business justification to excuse an unlawful termination." See, for example, NLRB v. Nash-Finch Co., 211 F.2d 622 (8th Cir. 1954).

¹⁰ However the sentence immediately preceding the latter, and to which the same appears to bear more direct relationship relates: "Pinkerton's obligation to the Union is based on Board certifications, the collective bargaining history and the contract."

¹¹ The procedural guidance of Board holdings in Pacific Southwest Airlines, supra, and American Bakeries, supra have been followed herein.

Motor Freight, 247 NLRB 146 (1980), wherein at 147 the Board majority held:

[We] will no longer honor the results of an arbitration proceeding under Spielberg unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator [We] will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions.

Here the General Counsel has argued under such holding that the requisite scrutiny of the arbitrator's decision fails to reveal any indication that the arbitrator actually considered the discrimination or unfair labor practice issues involved in the case at bar. In that respect, according to the General Counsel, the single sentence, "Nor was anyone in the Louisville Branch Office discriminated against by the action of the national office," is the only passing reference to possible discrimination or discriminatory conduct on the part of Employer; and it is the General Counsel's contention that the same is simply not sufficient to satisfy the Suburban Motor Freight, supra, standard for consideration of unfair labor practice issues; and it is contended as well that the generalized use of the word "legal," such as appears therein, hardly is to be deemed sufficent in that regard.

The Charging Party argues additionally that when the above-single (discrimination) sentence is viewed in (argued) context of the point under discussion by the arbitrator, to wit, the (additional) failure of the Company to obtain the Union's agreement during the 1980 contract negotiations to allow the Company to service a certain geographic area from the Louisville office with nonunion guards, the quoted sentence falls far short of the requisite standard for deferral set forth by the Board in Atlantic Steel Co., supra. Thus with differing view of the scope of the arbitrator's findings, and the issues herein, Charging Party Union, though joining Employer in a stated reliance on Atlantic Steel Co., supra, argues for its contrary application, namely, that the arbitrator did not make any factual findings on the discrimination issue that "are complete and comprehensive and factually parallel to the unfair labor practice"; and urges, pointedly, e.g., that rather, the Young grievance (itself) was considered by the arbitrator in light of relief sought and not as a discrimination issue.

(5) The various contentions advanced by the General Counsel and Local 71 that a deferral is in any event inappropriate, as the decision reached by the arbitrator is repugnant to the Act

The General Counsel first contends that the Respondent has in effect sought to sever a part of the bargaining unit by an administrative reorganization; but contends that since at the time of certification Pinkerton's employees working in Lexington were part of an appropriate bargaining unit, they remain members of that bargaining unit regardless of whether administrative matters are thereafter conducted through Pinkerton's Louisville or

Cincinnati office. To hold otherwise, so argues the General Counsel, would subvert statutory rights of employees to Employer's mere whim.

The General Counsel further argues that it is clear from certain arbitrator findings that the Respondent's decision to reassign its Lexington business from its Louisville to its Cincinnati office was to avoid its contractual obligations with the Union, since during negotiations for the current agreement the Respondent had unsuccessfully sought to change the recognition clause so as to be permitted to staff its Lexington operations with nonunion guards, which is the same result it has later sought to accomplish by corporate administrative fiat in assigning the Lexington area to the Cincinnati office. The General Counsel asserts Employer has done so because employers in Lexington, with which it sought contracts to supply guard services, were adverse to utilizing a unionized guard firm; and because higher wage and benefits paid under the Union's contract placed Employer at a competitive disadvantage in obtaining new customers. The General Counsel argues, from the above, that no clearer evidence of Employer's intent to circumvent its financial obligations under the contract, or of antiunion motivation in removing the Lexington area work from the bargaining unit could be manifested.

The General Counsel has thirdly advanced an argument (as anticipated by Employer) that the Board has held such a (contended) midcontract unilateral removal of bargaining unit work is violative of the Act, regardless of economic justification; and further, that proof of union animus is not necessary because Employer's actions were "inherently destructive of employee interest and that the employees lost the jobs to which they were entitled as a result of Respondent's efforts to escape its economic obligations under the contract." Brown Co., 243 NLRB 769, 771 (1979); and Los Angeles Marine Hardware Co., 235 NLRB 720 (1978).

In advancing an essentially similar argument that the arbitrator's decision is repugnant to the Act in that the arbitrator simply did not come to grips with Employer's obvious antiunion motivation in its unilateral reassigning the Lexington, Kentucky area from the unionized Louisville branch office to the nonunionized Cincinnati branch office, and did not determine the statutory impact of Pinkerton's attempt to avoid the union contract, the Charging Party appears to take a slightly different "tack," and presses on its basic contention in those respects that the arbitrator addressed only the contract issue. Thus, the Union contends that certain of the arbitrator's findings clearly demonstrate that the arbitrator was concerned only with the resolution of the alleged contract violation which the parties had presented to him through the grievance and arbitration procedure under the contract, and not with the resolution of the Union's statutory rights under the Act. The Charging Party would have the same found demonstrated from review of certain arbitrator findings, conceded as accurate:

According to the Company evidence the competition was generally nonunion and this placed the unionized Louisville Branch Office at a competitive disadvantage in bidding on jobs in the Lexington area. All of the Lexington accounts formerly serviced by the Louisville Branch were lost due to competitive bidding (i.e. lower price offered by competition for substantially equivalent service).

. . .

The Louisville Branch Office on several occasions had rebid for Brown & Williamson, but had been unsuccessful due to price. Mr. Liverett testified that the Louisville Branch Office could not match the price bid by the Cincinnati Branch Office to obtain the Brown & Williamson account. Mr. Liverett also testified that if the Company were required to place Mr. Young and other Louisville Branch Office guards at the Brown & Williamson job (and pay them the attendant wage required under contract), then the Company would have to raise the price to Brown & Williamson which would inevitably result in a "re-loss" of that account.

The Union's argument therefrom is, that rather than then determining the statutory impact of Pinkerton's attempt to avoid the union contract the arbitrator merely found:

It would be unreasonable to say that a company could not cease doing business in any city in which it at one time operated. Such a statement would assume that business does not change. The point is that the issue of whether an entity operates in a given city or not is not entirely within the control of the entity. In this case, I find that the Louisville Branch Office tried in good faith to retain the contracts in Lexington, but the prevailing economic conditions worked against its efforts.

. . . .

There can always be a question concerning the cause of the loss of business and whether or not any arbitrary, capricious or unreasonable company acts took place to cause the loss, but in the absence of more definitive contract language dealing with the problem in this case and in view of my findings that the loss of business took place because of prevailing business conditions rather than because of Company caprice, it is my judgment that there is no basis for finding a contract violation. (Emphasis as supplied by Union.)

(6) Other contentions

For the first time in brief, the General Counsel has submitted that a deferral herein is also not to be deemed arpropriate inasmuch as the arbitrator in his decision has construed the unit described in the Board's 1966 certification of the Union and the Board's underlying Decision and Direction of Election, including fn. 2 of the latter, which construction was an essential part of the arbitrator's ultimate resolution of the issues that were presented to him; and in that regard, so argues the General Counsel that there should be no deferral because the Board has consistently held that it will not defer on issues of representation, or questions of appropriate unit, with reliance stated on case, e.g., Cannon Air Conditioning Co., 252 NLRB 556, 557 (1980); and Ortiz Funeral Home Corp., 250 NLRB 730 fn. 2 (1980). The General Counsel further argued that the arbitrator's construction was wrong, but cites no authority for that proposition. The Charging Party has not advanced similar position thereon.

Employer has only relately asserted, in addition to urgings that it be noted that this is not an accretion case, or close down/reopen case, that in the event instant unfair labor practices are not to be deferred to arbitrator decision, that the facts herein relative to the Board certifications, contract application, and recognition clauses (in current, and prior agreements), and consideration of that Union own constitution (not before the arbitrator but offered herein) warrant finding that Lexington is not shown to be union "territory" under applicable Board precedent, as a certification has long been held not to be viewed as a jurisdictional award Plumbing Contractors Assn. of Baltimore, 93 NLRB 1081 (1951); Heating, Piping & Air Conditioning Contractors, 160 NLRB 34 (1954); and Carey v. Westinghouse Electric Corp., 375 U.S. 261, 269 (1964). The Employer also argues that the General Counsel and the Union cannot show that the contract was "intended" to apply to Lexington as their territory, as required, B & B Industries, 162 NLRB 832 (1967); National Electrical Contractors Assn., 152 NLRB 1604 (1965); and that there is no justification for departing from contract language of 20 years, see Temple-Eastex Incorporated, 228 NLRB 203 (1976).

Finally, although acknowledging that the Union had argued such a contention before the arbitrator, Employer urges, in the event there is not a deferral, that a General Counsel argument, if advanced, that the Company was acting in bad faith in "unilaterally implementing" a proposal that was rejected at the bargaining table cannot be litigated here, as it was not charged in the complaint.

6. The supplemental stipulations of fact; and additional documentary evidence

Following the General Counsel and Charging Party's advancement of contentions at hearing that the arbitrator had not considered the unfair labor practices alleged herein, and that the arbitrator also did not have all of the relevant evidence bearing on the unfair labor practices presented herein, over the Respondent's technical objections, certain supplemental stipulations of fact were then entered by the parties and received. They essentially are:

Stipulation 1. Among the reasons advanced at the bargaining table in the 1980 negotiations for the proposed change in the recognition clause in the collective bargaining agreement and the reason for Pinkerton's subsequent action of transferring operations in Lexington from the Louisville Branch Office to the Cincinnati (Branch) Office were:

- (1)—In the outlying rural areas served by the Louisville Branch Office most of the employers were non-union; and they had demonstrated a certain aversion to contracting for a unionized guard force. Thus, new accounts for the Louisville Branch Office were often difficult to garner in such areas.
- (2)—The higher union wage and benefits required pursuant to the contract were increasingly placing the Louisville Branch Office at a competitive disad-

vantage outside the Louisville Metropolitan Area, especially in Lexington, and vicinity.¹²

Stipulation 2. In the past, under the collective bargaining agreements that are part of the record exhibits in the arbitration proceeding, employees laid off from jobs when Pinkerton's Louisville Branch Office lost guard service contracts, could, and in fact at times did, bump Pinkerton's Louisville Branch Office employees with less company seniority from jobs which Pinkerton's Louisville Branch Office continued to service.

This procedure applied to the Lexington metropolitan area as well as others.¹³

Stipulation 3. In a March 11, 1981 letter, and in succeeding months, including December, 1981, and at times in 1982 as well, Liverett informed Roth that because of the wages and benefits provided for in the collective bargaining agreements between the parties, Pinkerton's Louisville Branch Office was unable to competively bid for contracts in the Lexington area, and lost contracts in the Lexington area to non-unionized guard service agencies. 14

Stipulation 4. None of the employees named in Paragraph 5 of the complaint have been employed by Pinkerton's since January 1, 1982. None of them have been offered employment at the Brown & Williamson operation in Lexington, Kentucky, since January 1, 1982. Employees of the Louisville Branch Office, working at the P. Lorillard account in Lexington, Kentucky were advised of an opportunity to continue employment by the Louisville Branch Office under the provisions of the collective bargaining agreement at a location in Burgin, Kentucky. The record shows that the employees refused that opportunity. 18

In addition, the record shows that employees of the Louisville branch office employed on the P. Lorillard account in Lexington, Kentucky, were also advised that there would be employment opportunities under the jurisdiction of the Cincinnati branch office on a new contract which the Cincinnati branch office had acquired

¹⁸ The essential substance of the stipulation is contained in the collective testimony of Liverett and Roth at the arbitration hearing. Even more significantly, the matters of Stipulation 1(1) and (2) were submitted to the arbitrator by Employer in its brief to arbitrator virtually in haec verba.

from the Brown & Williamson Company, effective January 1, 1982. The record discloses that they refused that employment because the Company would not continue to recognize Local 71 as the bargaining agent for the employees that would be so employed by the Cincinnati branch office.

Stipulation 5. The briefs submitted by the Union and the Company to the arbitrator will be a part of the record.

Stipulation 6. The employees named in paragraph 5 of the complaint were the employees who were the subject of the arbitrator's Decision, and employed in Lexington, Kentucky by Pinkerton's at the P. Lorillard facility prior to December 31, 1981.¹⁶

Additionally a letter of union counsel Raymond Sales, dated April 22, 1981, addressed to Davis W. Liverett, was offered and received in evidence as General Counsel Exhibit 2.

The above union letter was written in response to a certain letter of Liverett, dated March 11, 1981. (Liverett's letter had been made an exhibit before the arbitrator. The Union's letter in response was not.) In pertinent part the Union's April letter recited Roth's March letter's advice that effective May 1, 1981, the Louisville office would no longer service Fayette County (pertinently Lexington), and that all security personnel assigned to the P. Lorillard Company account will be transferred to the Cincinnati office; and it otherwise in pertinent part, provided:

I am not sure that we understand the full implication of this letter but the Union does insist that the Pinkerton employees working in the Lexington, Kentucky area and particularly the Lorillard Pinkerton employees continue to be in this bargaining unit and the Union will insist upon the representation of these employees.

After reciting the prior union certification and bargaining history, the letter went on to inform the Employer that "the Union expects that the Company will respect its contractual and legal obligations and continue to bargain with the Union and recognize the Union as the collective bargaining representative for these employees."

Although the arbitrator did not have the Union's April letter responding to Liverett's March letter, the arbitrator had made certain related findings as to the national office's decision to transfer Lexington to Cincinnati effective May 1, 1981, and that the P. Lorillard guards employed by the Louisville branch, though scheduled, were not subsequently transferred to Cincinnati branch office, but had remained employed by the Louisville branch office until that contract terminated and they were laid off, as earlier shown.

Additionally a copy of article III, jurisdiction, from the constitution and bylaws of Local 71, International Guards Union, as amended, was received in evidence as Respondent's Exhibit 1. It provides pertinently:

¹³ This stipulation is essentially the seniority clause in operation (of arbitration record) with affirmance of its prior application at Lexington.

¹⁴ The March 11, 1981 letter to Union President Nalley was an exhibit of record in arbitration proceeding, as was (essentially) evidence of Liverett's position presentments to Roth in 1981. It was not shown as precisely however, as to 1982 occurrences.

¹⁸ The fact stipulated in sentence one is not as fully of arbitration record. As to Burgin, Kentucky offer (sentence 3), with differing recollection at hearing as to the date of such offer, the parties agreed that they would be governed herein in regard to the date of such Burgin, Kentucky offers by what the arbitration record shows. The witnesses at the arbitration hearing report that the offer made as to Burgin, Kentucky employment was made after layoff on varied dates in the period early to mid-January, while the arbitrator found that (at least) grievant Young was offered Burgin, Kentucky employment prior to layoff, which occurred on December 31, 1981. Notably the arbitration record testimony does reveal that Young was offered opportunity to be employed by Cincinnati branch office prior to layoff.

¹⁶ This stipulation is more definitive in detail in application to all five alleged discriminatees herein.

The jurisdiction of Local Seventy-One of the International Guards Union of America shall be confined to all persons employed as guards within the authority of the Louisville, Kentucky Office of Pinkerton's, Inc., subject to change by the Central Executive Council of the International Union.

The foregoing also was not made an exhibit before the arbitrator, nor does the arbitrator make reference thereto. The arbitrator did consider relevant portions of the contract which in pertinent part provided that the agreement "shall apply to all guards employed at the Louisville Office by Pinkerton's, Inc." and that "the Employer recognized the Union as the exclusive bargaining agent for all guards within the bargaining unit . . . The term 'Employee' shall include all guards of the Employer assigned to duty by the Louisville Office. . . ."

In regard to the above supplemental stipulations of fact entered by the parties at the hearing, Employer in brief argues that since the Union was represented by the same counsel in arbitration (both at hearing and on brief), as here, and since the General Counsel and the Union have conceded the arbitration was fair and regular, the above stipulated facts cannot be inconsistent with those of record before the arbitrator; and it asserts that Employer consented to the stipulations only because the facts requested by the General Counsel and the Union were already of record.¹⁷

Finally as the parties' several positions, in the main, have centered in contention on what was presented and is indicated was considered and ruled upon by the arbitrator in reaching his opinion and award it would appear also appropriate to additionally observe that the arbitrator therein presented the current contract's article XVI, grievance procedures, which inter alia pertinently provides:

F. The arbitrator shall be limited in considering and deciding only the particular complaint presented and the decision shall be limited to the interpretation of the provisions of this Agreement as it applies to the complaint.

Analysis, conclusions, and findings

The arbitration proceedings were conducted in a fair and regular manner, and all parties had agreed to be bound by the arbitration. Procedural questions momentarily aside, the major issues broadly viewed center on the further Spielberg requirement that the arbitration award not be clearly repugnant to the purposes of the Act: and the additional deferral requirement, later established by the Board, e.g., in Raytheon Co., 18 which is essentially that the arbitrator have considered the unfair labor practice(s) raised in complaint. Resolution of the latter question of arbitrator consideration may involve addressment of any of a number of factors. Thus, a

Board majority early observed in Raytheon Co., supra, that the statutory issue presented to the Board, which was one of protected union or concerted activities, or pretextual discharge, was not the same issue as the contract issue considered by the arbitrator, which was one of whether employees had violated a no-strike clause. The arbitrator had also received an explicit instruction from one party that the arbitrator was to limit himself to a resolution of the contract issue; and there was acquiescence, or essential agreement thereto by the other party in that there was no effort by that party to advance any statutory contention that exceeded the limitation thus placed on the arbitrator. The evidence bearing on the different legal issues also was determined not to be the same; and all of the evidence bearing on the statutory issue had not in fact been presented to the arbitrator. When the omitted evidence was subsequently offered and received in the unfair labor practice proceeding, upon evaluation it was found in nature to be persuasive that a pretextual discharge had occurred. In light of instruction given the arbitrator that the arbitrator could not even consider evidence that concerted activities were possible causes for the discharges, the Board majority consequently concluded that the arbitrator had necessarily ignored the unfair labor practice issue presently before the Board; and the Board thereupon stated: "We cannot, in giving effect to arbitration agreements, neglect our function of protecting the rights of employees granted by our Act."19

The Board's basic requirements for the consideration of an unfair labor practice issue in an arbitration proceeding such as would support deferral is found in Suburban Motor Freight, 247 NLRB 146, 147 (1980). In Suburban Motor Freight, a Board majority²⁰ held, in respect to an unfair labor practice issue of alleged respondent discrimination against employees, essentially that before there may be a Board deferral to an arbitration award the unfair labor practice issue(s) must have been both presented and considered by the arbitrator; there must also be indication that the arbitrator ruled on the unfair labor practice issue(s); and the party seeking the deferral has the burden to prove that the issue of statutory discrimination was an issue litigated refore the arbitrator.

In an earlier case, where a specific finding on a remaining unfair labor practice issue (involving the legality of a recision of contract) had not been made by the arbitrator, a Board majority²¹ had nonetheless held that the arbitrator's required consideration of the unfair labor practice issue was satisfied where the arbitrator had made all the factual and legal findings necessary for the

¹⁷ In view of ruling herein, any effect of seeming disparity between Employer's generally referenced four supplemental stipulations and those above shown and numbered six, for convenience, need not be further addressed.

^{18 140} NLRB 883 (1963), enf. denied on other grounds 326 F.2d 471 (1st Cir. 1964).

¹⁹ The Board had earlier arrived at similar result of refusing to defer where the parties had submitted an unfair labor practice issue to an arbitrator but the arbitrator's award did not even purport to resolve the unfair labor practice issue (one of discharge for union activities) because the arbitrator explicitly stated he had ignored the unfair labor practice issue, and resolved the matter on other grounds. Monsanto Chemical Co., 130 NLRB 1097, 1099 (1961).

²⁰ The majority consisted of (then) Chairman Fanning and Members Jenkins and Truesdale, with Member Penello dissenting.

²¹ Members Penello, Murphy, and Truesdale (concurring) comprised the majority view, with (then) Chairman Fanning and Member Jenkins dissenting.

disposition of the remaining unfair labor practice issue on the basis of a full record developed by the parties in a fair and regular proceeding; indeed, his findings otherwise were deemed such as in nature to preclude any other result, Kansas City Star Co., 236 NLRB 866, 867-868 fn. 6 (1978). A Board panel²² in an interim case, Atlantic Steel Co., 245 NLRB 814 (1979),28 had observed that while it was preferable, it was not required that an arbitrator pass on the unfair labor practice directly, with Board indicating the arbitrator could do so "implicitly:" and with Board clear statement of the only requirement, as being, "it is necessary only that the arbitrator has considered all of the evidence relevant to the unfair labor practice in reaching his or her decision." Id. at 815. The Board ruled in Atlantic Steel, on the basis of Kansas City Star, supra, and presented explanation of the rationale of the latter's holding as being, "because the finding were both complete and comprehensive and factually parallel to the unfair labor practice question." The Board concluded in Atlantic Steel, that there was also present therein such a factual parallelism between the contractual issue (one of legality of discharge involving considerations of whether a discharge was for use of insubordinate language to a supervisor, or instance of a supervisor's continued harassment of an employee because of prior involvement with a petition for benefits) and the unfair labor practice issue as raised in complaint (alleged unlawful discharge for protected activity, i.e., for intemperate, but protected employees words as spoken to a supervisor during a grievance discussion). The Board observed that the arbitrator, on the basis of a consideration of all the testimony, made a determination of what had actually occurred, that he had thoroughly considered all of the evidence and had made factual findings supported by the evidence; that he had passed upon all relevant aspects of the unfair labor practice; that in doing so, he had considered those factors relevant to the unfair labor practice that the Board considers; and that the arbitrator had reached a result not repugnant to the Act. The Board accordingly by deferred to both the arbitrator's findings, and his decisional result.

Similarly, a Board panel majority²⁴ later deffered where an arbitrator, despite having made concurrent statement that he was not deciding whether the employer had violated Section 8(a)(5), nevertheless, had then proceeded in the course of resolving the contractual issue presented, to make factual findings of nature which resolved the unfair labor practice issue, Bay Shipbuilding Corp., 251 NLRB 809, 810-811 (1980). Thus, in Bay Shipbuilding, the arbitrator had proceeded to make factual findings in resolution of the contractual issue of whether an employer's action in changing an insurance carrier was permitted by an existing contract, or had violated the contract. (The latter eventuality would in turn then constitute a unilateral midterm modification of the existing contract, and argued unilateral action in violation of

the Act.) On considerations of prior negotiation statements made by the parties leading to significant related changes from the prior contract, the arbitrator determined the Company's contention that the Union had freed the Company to change the insurance carrier, was supported; and the arbitrator (on that basis) concluded that the employer's action in later changing insurance carrier was one permitted by the contract. On these facts, Board majority concluded that the arbitrator's determination that the contract had permitted the Employer to make the change was not unreasonable, as there had been a significant (related) change from the prior contract, the matter was an important issue in the negotiations, and union statements during negotiations might reasonably be considered a concession on the point. The Board also found that the result reached by the arbitrator was not (clearly) repugnant to the Act. Thus, as the action of the Employer, under the circumstances there presented, was reasonably found to be an action permitted by the contract, it was not a modification of that contract, and hence, also, was not a unilateral action in violation of the Act.²⁵ However, where facts supporting a specific union contract concession are absent, as essentially, where abritrator decisional basis rests only on an arbitrator approach of an Employer's (contract) right to act unilaterally ". . . because the contract did not specifically limit or restrict such actions," and in doing so has ignored well-established Board precedent holding exactly to the contrary, there has been resultingly no deferral by the Board, cf. Alfred M. Lewis, Inc., 229 NLRB 757 (1977), modified 587 F.2d. 403 (9th Cir. 1978); Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013 (1982).

In a recent reaffirmation of the requirement of Suburban Motor Freight, supra,26 (and with a majority renewed rejection of an earlier contrary majority Board holding in Electronic Reproduction Service Corp., 213 NLRB 758 (1974), the Board majority further explicated that Board deferral policy permits, but does not require a grievant's simultaneous litigation of all (contract and statutory) issues before an arbitrator; that an employee grievant may ". . . challenge disciplinary action solely on the ground that discipline invoked for the stated offense was inconsistent with the Employer's past practice or otherwise violated contractual provisions unrelated to the Act"; and that ". . . election to proceed in the contractually created arbitration forum provides no basis, in and of itself, for depriving an alleged discriminatee of the statutorily created forum for adjudication of unfair labor practice charges." Propoco, Inc., 263 NLRB 136, 137

²² Panel decision was made by Members Murphy and Truesdale, with Member Penello concurring.

²⁸ Cited subsequently approving, e.g., G & H Products, 261 NLRB 298

fn. 2 (1982).

**Panel majority consisted of (then) Board Members Penello and Truesdale, with Member Jenkins dissenting.

as In separate concurring opinion, Member Truesdale who had participated in the several majority opinions as earlier noted, including as a participant of the majority in Suburban Motor Freight, supra, significantly observed, id. 811 fn. 3, "Like Atlantic Steel, Suburban Motor Freight does not require that an arbitrator pass on the unfair labor practice explicitly. Rather, the Board stated that it would not defer to an award 'which bears no indication that the arbitrator ruled on the statutory issue' Here the award does indicate, by virtue of the arbitrator's factual findings and the virtually identical nature of the contractual and legal issues, that the arbitrator passed on the unfair labor practice question."

²⁶ The Board's expression of deferral standards in Suburban Motor Freight, supra has itself received even more recent approval in being specifically upheld by the Sixth Circuit Court of Appeals in NLRB v. Magnetics International, Inc., 699 F.2d 806 (6th Cir. 1983).

(1982). Board majority opinion also therein related in (general) regard to unfair labor practice issue(s) raised in arbitration proceeding, that there are no special rules (apart from Spielberg) "... concerning the manner in which such an issue can be litigated in arbitration proceedings," id. at 138 fn. 8; but majority opinion in Propoco, Inc., supra also held that Suburban Motor Freight's requirements are not satisfied when the contractual and unfair labor practice issues are factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue, with statement: "Merely considering the relevant facts does not necessarily lead to consideration of the statutory issue.' Id. at 138.27 Seemingly preserved for appropriate deferral are cases where the contract and statutory issues are the same, or virtually identical, and/or with issue presented, the arbitrator has considered in resolving the contract issue, the factors which the Board would consider in resolving the unfair labor practice issue, thus "implicitly," or latently deciding the latter issue as well.

The procedural questions resolved

Employer's motion for deferral was taken under advisement; but its alternative motion to restrict the parties to the evidentiary record solely made before the arbitrator was initially denied. Thereupon the parties entered certain supplemental stipulations of fact and both the General Counsel and Employer made offer of certain additional documentary evidence earlier noted. Employer urges in brief that the supplemental evidence cannot now be determined as in any way inconsistent with the arbitrator's findings because the General Counsel and the

Charging Party have conceded that the proceedings before the arbitrator were fair and regular.²⁸

In Suburban Motor Freight, supra, it was held that the party urging the deferral has the burden of proving that the statutory issue (there of discrimination) was an issue litigated before the arbitrator.29 In that regard, the related submission of the specific grievances presented to the arbitrator for resolution, and the submission of the full text of the arbitrator's opinion and award, as was done by Employer herein at hearing in support of its motion for deferral under Spielberg, was sufficient to prima facie meet the Respondent's burden on its raised Spielberg defense, see, e.g., John Sexton & Co., 213 NLRB 794, 795 (1974). The Respondent's further submission of the arbitration transcript and exhibits are serviceable for a prima facie presentment in support of its contention, and required showing that the arbitration proceedings were fair and regular and binding; and the same, in combination with the submission of the grievances and text of arbitrator decision, also serve as a prima facie presentment for the conduct of the required review of the record by the Board for an assurance that the arbitrator's findings are consistent with the record evidence, and that there are no facial errors in the arbitrator's factual findings, cf. Kansas City Star Co., 236 NLRB 866, 869 (1978); Atlantic Steel Co., 245 NLRB 814 fn. 2 (1979). 80 However, that prima facie presentment by Employer does not necessarily end an evidentiary inquiry. For the General Counsel (or the Charging Party) may still seek to show by an appropriate evidentiary offering that in some manner the proceedings in fact were not fair and regular; that the issue submitted to the arbitrator did not encompass the unfair labor practice issue(s) raised in complaint and relatedly, that not all the relevant evidence bearing on the statutory issue claimed omitted was presented; or as well, desire to present evidence in combination with a contention to be raised that the decision of the tribunal was repugnant to the purposes and policies of the Act, is at odds with the statute, or that clear Board precedent

²⁷ In *Propoco. Inc.*, supra, former (then) Member Fanning and Members Jenkins and Zimmerman comprised the majority view, with (former) Chairman Van de Water and Member Hunter dissenting separately. Majority held view that the unfair labor practice issue had neither been presented to, nor considered by the arbitrator, while both Chairman Van de Water and Member Hunter held a contra-view. Otherwise, in dissenting, Chairman Van de Water expessed his opinion as being one (essentially) in disagreement with Suburban Motor Freight, as departing from sound deferral policy; and that, even were he to agree to it in principle, expressed further disagreement with adding its standards viewing the same as administratively unsound in that the standards "lack clarity," and ". . do not resolve but create problems of how thoroughly the statutory issue has to be presented and how completely the arbitrator has to consider the issue." Id. at 144. In its considerations of the question of "how thoroughly the statutory issue has to be presented" the Board majority had observed the problem, to the extent it exists, will be no greater in the context of arbitration proceedings than when it arises in context of certain other (specified) proceedings, Id. 137. Member Hunter in his dissent would apply standard (viewed as one comporting with approach used previously by the Board) that would not require an arbitrator to pass explicitly on the unfair labor practice, ". . . would find that the arbitrator had adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) it appears from the record that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." Id. at 145. Member Hunter otherwise explicated his view on Suburban Motor Freight: "My agreement with Suburban Motor Freight is limited to its holding that deferral is unwarranted where the arbitrator is not presented with the evidence relevant to the unfair labor practice." Member Hunter noted certain prior Board holdings, and would appear to ascribe to the (seemingly compatible) prior Board majority holdings in Kansas City Star Co., supra, Atlantic Steel Co., supra; and Bay Shipbuilding Corp., supra. Id. at 145 fn. 30. My own research has not revealed that Chairman Dotson or Member Dennis have presently addressed these issues.

²⁸ The arbitrator noted: "Full opportunity was given each party for the presentation of evidence, examination and cross examination of witnesses. Each Party elected to file a post hearing brief." The General Counsel of course was not a party in the arbitration proceeding.

³⁰ The statutory issue was there one of discrimination, but the Suburban Motor Freight holding is not limited to 8(a)(3) issues, cf. Navajo Freight Lines, 254 NLRB 1272, 1280 (1981).

While former (then) Chairman Fanning and Member Jenkins have since in a Board panel case stated their intended nonreliance on Kansas City Star Co., and Atlantic Steel Co., supra, e.g. see Designcraft Jewel Industries, 254 NLRB 791 fn. 1 (1981), my own research has revealed no clear Board majority reversal of either case, nor did it appear therefrom such has been clearly indicated. Thus Member Zimmerman has subsequently indicated a reliance on Atlantic Steel Co., e.g., see G & H Products, 261 NLRB 298 fn. 2 (1982), as does Member Hunter seemingly see his dissent in Propoco, 263 NLRB 136, 145 fn. 30 (1982). The majority opinion in the Propoco case, which included Member Zimmerman, did not specifically address the prior majority Board holdings in either Kansas City Star Co. or Atlantic Steel Co., but rather that case holding rested on a majority view of the facts presented in Propoco that the unfair labor practice issue had not been even presented to the arbitrator, as well as not really considered by the arbitrator. Seemingly with significant bearing on earlier Board holdings however, is Board majority reference therein to employee permissive forum choice in disciplinary challenge on basis of past practice or contractual provision where unrelated to the Act.

exists to the contrary. See generally John Sexton & Co., 213 NLRB 795 (1974).³¹

To be sure upon review of the arbitration record presented herein he the General Counsel and Charging Party promptly acknowledged that the arbitration proceedings conducted therein were fair and regular and binding. However, both as promptly otherwise raised claim that the unfair labor practice issues raised in the complaint were neither presented to, nor considered, nor was there adequate indication that they were ruled upon by the arbitrator. In contravention of certain arguments advanced by the General Counsel and the Union, Employer made certain counterarguments based on claimed "implicit" findings that were made by the arbitrator. I conclude and find on the above and the record presented on this issue as a whole, that certain of the claims advanced by the General Counsel and Charging Party Union were arguable claims.

Furthermore, it seems to me that where such an arguable claim is raised as to a nonpresentment, nonconsideration of, or insufficiently indicated ruling by an arbitrator on an unfair labor practice issue(s), as herein, or when related claim is made, as herein, that the arbitrator did not have all the relevant evidence presented to him, that a respondent who seeks to rest on a raised Spielberg defense, even with prima facie presentment made thereon, as above, may not by its own motion then foreclose the other party(ies) from offer of the relevant evidence to support such arguably counterclaims. Indeed the case of Amoco Texas Refining Co., 251 NLRB 1528 (1980), advanced by Employer essentially as the support for its position, itself does not support the Respondent in that stated purpose. Rather there, all parties, though with countervailing party contentions advanced and preserved by reservation on the arbitrator's legal conclusions, stipulated a factual record as found by the arbitrator on complaint/deferral issues; and they voluntarily forewent offer of oral testimony. Accordingly, earlier ruling at hearing denying the Respondent's alternative motion to in effect limit the parties in bringing available evidence before the Board on that authority to only the record evidence presented to the arbitrator is reaffirmed, and to extent Employer's motion is to be fairly construed as one being renewed in that sense, it is again denied. Moreover I reject any suggestion that evidence stipulated at open hearing is not before me for a full, appropriate consideration. However, to the extent Employer merely urges that whether the arbitration proceedings herein provide warrant for a Spielberg deferral remains the threshold question, I do agree.

The substantive deferral issues resolved

The resulting threshold question is the one of Employer's motion for a deferral. The issues are whether the

unfair labor practices alleged in complaint were previously presented to, considered by, and are adequately indicated ruled on by the arbitrator, under existing Board precedent. I begin with observation, as urged by Employer, that a de novo review of the evidence of record before the arbitrator, as with view to a susceptibility of that evidence to present inference of fact differing from the facts found by the arbitrator, is procedurally not in order in addressing the initial issue of requested deferral. cf. American Bakeries, 249 NLRB 1249, 1251 (1980). Rather the record made before the arbitrator has been reviewed for its consistency with the findings made by the arbitrator; and I have discerned no material facial error in those finding that, in my view, would preclude such a deferral.³² Moreover, the arbitrator's findings of fact are otherwise observed to have been comprehensive and fully supported by the record evidence; and his findings of fact well support the conclusions he has reached.

It is readily apparent that the arbitrator made comprehensive and precise factual findings broadly covering the administrative and operational business juxtaposition of the Louisville branch office, the national office and the Cincinnati Branch office. The arbitrator's findings projected: Employer's long conduct of business through nationally structured, but separately and locally operated branch offices, inclusive of the unionized Louisville branch office and the nonunion Cincinnati branch office; the Union's full and longtime awareness thereof.

The arbitrator also addressed the pertinent considerations of the current and prior contracts between the Louisville branch office and the Union, and the relevant past practices thereunder, and as well considered the Union's certification(s), all comprising elements of the long history of their collective bargaining; that was observed to warrant conclusion by him of an ultimate fact that the Union's prior representation was of employees employed by, or out of Employer's Louisville branch office in various cities, and not limited to those named in Board representation documents. The arbitrator also found the more recent and continuing history of the Louisville branch office's loss of business in the Lexington area to its nonunion competitor's on basis of low bid, which had resulted in uncontested regression in its Lexington business from that in years past being sufficient to support a suboffice to that of a service provided to but one remaining account, that it subsequently learned in 1981 that it was to also lose. The arbitrator addressed the pertinent terms of the current agreement, and the relevant prior 1980 negotiation positions of the parties that led to their current agreement, inclusive, as material herein, Louisville branch office Manager Liverett's

⁸¹ Any indicated evidentiary restriction that might be viewed as presented in John Sexton & Co., supra, in regard to an unfair labor practice issue that could have been submitted (presented) to the arbitrator but was not, as might be viewed to arise from Board majority reference therein to Electronic Reproduction Service Corp., 213 NLRB 758 (1974), is clearly, and effectively removed by the Board's (majority) explicit overruling of the latter case in Suburban Motor Freight, supra, with its rejection now reaffirmed in Propoco, Inc., supra.

³² The sole apparent variance from record evidence appearing in a finding is one of a seeming inadvertent transportation of date of job offer made to Young. It involves the Burgin, Kentucky job offer by Employer reported by arbitrator as occurring prior to Young's layoff, while only job opportunity for his employment at the Cincinnait branch office clearly appears of record to have been presented to him by Employer prior to layoff, and with the only record (testimonial) evidence otherwise clearly indicating the Burgin, Kentucky job offer was made to Young shortly after Young's layoff and his filing of grievance. In the circumstances of this case, the same, in my view, is not of material, certainly not controlling significance.

candid proposal to make the Louisville branch office more competitive in Lexington by staffing its future business operations there with Louisville branch office employed guards who would be nonunion, that is, not have union contract rates, etc., applicable to them; the Union's rejection of that proposal after discussion, and the omission of that proposal from the terms of the current agreement; the circumstances of notice (observed to be open, prompt and in advance) to the Union by Louisville branch office Manager Liverett that effective May 1, 1981, the Louisville branch office would no longer include Fayette County (Lexington area) and that the same was to become a territory of the Cincinnati office; the limited action of the national office in its reassignment of responsibility for pursuing future Lexington business opportunities in Lexington to Cincinnati branch office; the circumstances of the pursuit and subsequent success of the Cincinnati branch office in the Summer and Fall of 1981 in obtaining the Brown and Williamson contract on a low bid basis, and with a compared analysis of the factors that were indicative there would have been a continued failure on the part of the Louisville branch office in an attempt to retrieve that contract because of its inability to meet the successful low bid price submitted by the Cincinnati branch office; and with concluding findings: that Young was properly laid off because at that time the Louisville branch office did so, it did not have any other business in Lexington; and that Employer had not violated the contract because the Louisville branch office had tried, in good faith, to procure further business in Lexington but could not (with fuller record support of described efforts); and because the national office had not, under the terms of the contract and all the circumstances, acted unreasonably, arbitrarily, or capriciously in its earlier reassignment of Lexington to its Cincinnati branch office, because, at the time it acted, in the arbitrator's judgment, the Louisville branch office's business in Lexington was already gone. In short, in my view, the arbitrator found all the facts of what happened, and in doing so he concerned himself in making his factual findings with circumstantial factors that the Board would consider in its evaluation of related raised unfair labor practice issues.

The General Counsel and the Union have essentially contended that the arbitrator was presented with, and had considered and decided only a contract issue; and that there was resultingly inadequate indication of consideration of the unfair labor practices raised herein, and inadequate indication that the arbitrator ruled on the discriminatory issues. First, to be sure, the arbitrator's articulation in the framing of the issues presented (as compared with his summary of their positions) was in terms of whether there had been contract violations committed by the Employer, as were essentially the parties' own initial presentment of the issues to him at the outset of arbitration hearing. (In my view the Board certification was presented by the parties to the arbitrator for relevant consideration on the coverage issue, viz. for his interpretation of the contract's recognition and purpose language and to assist his understanding and evaluation of the parties' related past practices under their agreements.) While neither initial presentment by parties, or issue framing by

the arbitration in terms of contract violation is unusual, and both may also support intended party restrictive submission of a contract issue only, neither, is controlling of whether a contract issue alone had been presented to the arbitrator.

The arbitrator's basic factfinding that there had been a reassignment of Lexington from the unionized Louisville branch office to the nonunion Cincinnati branch office does not stand alone. Thus the arbitrator summarized the Union's position (presentment) as inclusive of contention, inter alia, that Employer's obligation to the Union (in regard to Lexington) based on Board certification, collective-bargaining history, and the contract was one that a unilateral determination (by the Company) cannot defeat. The Union also clearly presented a contention to the arbitrator that the Company attempted, but failed in the 1980 negotiations to include language which would have excluded the Lexington area, among others, from the jurisdiction of the bargaining unit, and that "The Company should not now be permitted to unilaterally accomplish the same result under the guise of a 'corporate reorganization."

Moreover, there is merit in Employer's argument that the Union's stated contention in its brief to arbitrator constituted a further presentment of additional discrimination issues, there characterized as involving the Employer's "... obvious antiunion purpose in unilaterally reassigning the Lexington area to the Cincinnati office . . .", and which itself followed highlighted observance of related well established Board principle, ". . . that an employer's desire to escape a financial burden resulting from the collective-bargaining process is not an adequate justification to excuse an unlawful termination." I am wholly persuaded therefrom and other evidence, that the arbitrator effectively had presented to him, indeed by both parties³³ an issue bespeaking in nature of bearing on both the contended contractual issue of violation of contract in Employer's unilateral administrative reassignment of the Lexington area and failure to apply the contract to guards working there, and one as clearly, in my view, raising the related arguable unfair labor practice issue of an employer unilateral action therein in violation of Section 8(a)(5), and under the circumstances, with attendant claimed employee loss of jobs, of Section 8(a)(3),

³³ The Employer's own brief to arbitrator in anticipation of "unilaterally implementing" argument from the Union had urged upon the arbitrator that honest analysis of their proposal to the Union during negotiation will show that in reality

^{... [}t]he company was attempting to honestly deal with the Union in response to a deteriorating competitive position. The proposal was an attempt to deal with continuing service out of the Louisville office not a transfer of operations to another office. Moreover, the proposal was not implemented, notwithstanding that as demonstrated above the company had the right to do so. The P. Lorillard guards were permitted to remain employees of the Louisville branch office (and draw union wages) until the P. Lorillard contract expired, even though the transfer of Lexington to the Cincinnati branch office had already taken place. Also, the remainder of the proposal (e.g., the rural areas where non-union companies had indicated an aversion to union guard service) was never implemented, and those locations are still serviced (albeit non-competitively) by the Louisville branch office.

In short, the stated contractual and unfair labor practice issues do present factual parallelism; and the specific 8(a)(5) unfair labor practice as alleged herein, namely of unilateral withdrawal of recognition from the Union as representative of the employees (then) employed in Lexington (by the nonunion Cincinnati branch office), if not also constituting the contractual and statutory issue the same issue by virtue of being properly to be viewed as but another facet of the same issue of reassigment of Lexington, at least, is virtually the identical issue in addressing but an effect that followed the Employer's same act of reassignment of Lexington to the Cincinnati branch office and its refusal to thereafter recognize the Union as the representative of employees employed by that nonunion branch office. Thus, whatever view of initial contract issue presentment by the parties one takes vis-a-vis initial reference to Board certification, it is clear that neither party continued to so restrict their own presentment; a factor early and long considered of real significance in resolving deferral issues, cf. Raytheon Co., supra, and Propoco, Inc., supra.

In passing, it is relatedly observed that though only one employee (Young) grieved, and his grievance on its face presents essentially only a seniority (contract) claim, the Union's concurrent general grievance was more broadly based and the Union thereon specifically presented claim that their contract covered any Pinkerton guards in the Lexington area, thus inclusive of Young's contract rights in that regard, as did its general charge herein extend to a complaint allegation of discriminatory refusal to recall from layoff all five named employees laid off from P. Lorillard in Lexington. In that regard it is additionally significant that the arbitrator found the grievances of Young and the Union were interrelated, and there is surely much support for that finding. I conclude and find that in substance and effect, the arbitrator's opinion and award effectively extended to all the employees named in complaint, wholly aside from a consideration of the supplemental detailed evidence offered to that effect.

It is also clear enough that the arbitrator considered and ruled on the above issues variously centering around prior negotiations and the claims of unilateral administrative action in Employer's reassignment of Lexington, obvious antiunion and avoidance of contract purposes. On the evidence presented, the arbitrator effectively found to the contrary. Firstly, he found that the Louisville branch office did not subsequently obtain any nonunion business in Lexington, but rather there had been an ongoing loss of business by it; that it had tried, in good faith, to obtain further business in Lexington but had failed in its efforts; that its loss of business in Lexington had taken place because of prevailing business conditions; that the cause of the problem was that the Louisville branch office with whom the Union had dealt from the beginning of its existence could not competitively retain the business that it once had in Lexington. Secondly, while the arbitrator was well aware of the possibilities for a questioning of cause of loss of business in a situation such as this, he concluded the reaction of the national office here was one in nature of doing something about the above loss of business by its Louisville branch

office; and given all the circumstances, it was not arbitrary, capricious, or unreasonable; and he ruled nor were Louisville branch office employees effectively discriminated thereby, as in the arbitrator's judgment the Lexington business area was substantially and effectively gone for the Louisville branch office at the time the national office acted. The arbitrator also found that the unionized Louisville branch office and the nonunion Cincinnati branch office operated separately; and that the Cincinnati branch office was thereafter successful in obtaining the new contract from Brown and Williamson (an account that the Louisville branch office had itself lost and could not retrieve), on the basis of a low bid, one that the Louisville branch office itself could not meet. In my view, these findings and conclusions are sufficient indications that the arbitrator in addressing and making such factual findings and conclusions was concerning himself in his factual analysis with an evaluation of the facts bearing on all the Union's above-raised concerns, inclusive of those with potentially antiunion, or discriminatory purpose. He found the reasons to be of economic base.

On the basis of the same findings of the arbitrator, I further conclude and find that the arbitrator's decision is not one to be viewed herein as clearly repugnant to the purposes and policies of the Act; nor is it one palbably wrong or contrary to existing Board precedent.

The arbitrator explicitly found that the national office had not acted on whim. Nor was the arbitrator persuaded to earlier union urgings (essentially the same as raised by the General Counsel herein) that the Employer's purpose was obviously antiunion and constituted a unilateral circumvention of its contractual obligations, in light of related party joined issue presentments thereon (inclusive of those in briefs submitted to the arbitrator), the findings he made, and the arbitrator's clear statement of an assurance to the parties that their efforts had been of assistance to him in understanding the issues and in reaching a decision; and pointedly, in rendering his opinion that he had considered all of the arguments made on behalf of the grievants. In that connection I have carefully considered the ably framed, but related contentions, by the General Counsel that the Employer has here sought by an administrative fiat to effectively sever a part of an established bargaining unit and/or remove bargaining unit work from the Union, and the separate point made by Charging Party Union that, "[N]otwithstanding the fact the bargaining unit is no longer allowed by Pinkerton's to service Lexington, Kentucky area employers, Pinkerton's nevertheless continues to provide guard service in that area," as pointing up effectively that the reassignment of the Lexington area by the national office had a twofold effect, one of opening up that territory to business opportunity by its nonunion Cincinnati branch office, and of foreclosing such to its unionized Louisville branch office; and (as seemingly noted before the arbitrator) that it did so without further bargaining.

The basic contention made herein by the General Counsel and the Union is essentially the same, that the Employer has sought to solve a problem the Louisville branch office had, by a prohibited unilateral midterm modification of the contract between its Louisville

branch office and the Union. The problem in turn with any efficacy in that contention, is the one already noted in answer given by the arbitrator, viz., that the fact was that the Louisville branch office had not been able previously to obtain additional work in Lexington for the employees it employed in Lexington because its higher wages, benefits, etc., paid union members had to be reflected in its bid submissions, and it also did not thereafter obtain nonunion work. The short answer to the above-contended unilateral midterm modification contention, it seems to me, is thus that the arbitrator, on a full record, has effectively found the facts to be the contrary.

That is the clear import of his findings essentially that though the Louisville branch office had tried in good faith to obtain further business in Lexington, it could not do so because of prevailing business conditions; that the proposal by the Louisville branch office during negotiations that it in effect be allowed to operate nonunion in Lexington was its own candid proposal as one competitive solution to its uncontested deteriorated business base there; and that the national office in later reassigning Lexington from its unionized Louisville branch office to its nonunion Cincinnati branch office was explicitly neither done on whim, nor arbitrarily or unreasonably, but was its own attempt to deal with the Louisville branch office's terminal Lexington business base. Nor did he find the national office had discriminated against employees (then) employed by the Louisville branch office because by the time it acted in reassigning the Lexington territory from its Louisville branch office to its Cincinnati branch office, the business opportunities in Lexington for the Louisville branch office in the arbitrator's judgment, were already effectively gone. It seems to me that is the critical finding that the arbitrator has made, that resolve the grievances, and resolves this case.

The arbitrator's judgment is itself one clearly supported by the facts he has found; and in my mind's eye, it cannot be questioned herein without effectively engaging in a prohibited review of the record made before the arbitrator in exploration for any possible inferences of fact differing from the facts he has found. This arbitrator, in my view, did not rest his decision simply on an absence of a restriction of Employer authority in the contract. First, he affirmatively found that the Employer operated through separate branch offices. Secondly, he analyzed the circumstance of both branch office and national office. He found that the Union did not agree to the Louisville branch office's relief proposal (in regard to Lexington) made in negotiations; and he further found it was not made a part of the contract. However, the arbitrator then found the fact to be that the Louisville branch office did not later obtain (nor did it appear that it even sought to pursue) any nonunion work in Lexington. He also brought to bear industrial realism in addressing and analyzing what the national office did. Relatedly, but significantly so, there was no transfer of bargaining unit work here, that the Louisville branch office then had, to the Cincinnati branch office; nor in light of the above arbitrator findings any reasonably to be viewed relocation of anticipatory bargaining unit work to which the bargaining unit employees employed by the Louisville branch office might be arguably (at best) viewed as justly entitled under the terms of their existing contract, as is essentially claimed by the General Counsel. To the contrary however, the arbitrator found the presently held bargaining unit work of the Louisville branch office in Lexington, though known to be itself terminal, was nonetheless retained by the Louisville branch office until, without renewal, it ended on December 31, 1981; and the arbitrator otherwise found the realistic fact on the hard issue presented him, that by the earlier time the national office had reassigned Lexington, away from its Louisville branch office to its Cincinnati branch office, further business opportunities no longer existed for the Louisville branch office under the prevailing business conditions.

Consequently, absent evidence of transfer of bargaining unit work, or of a relocation of bargaining unit work or employees it would appear that the cases basically relied on by the General Counsel, viz., Brown Co., 243 NLRB 769 (1979); and Los Angeles Maine Hardware Co., 235 NLRB 720 (1978), to show repugnancy, are for such reasons inter alia to be readily distinguished. Moreover, the cases of A-1 Fire Protection, 233 NLRB 38 (1977), remanded 600 F.2d 918 (D.C. Cir. 1979), reaffd. 250 NLRB 217, 219 (1980), and Ingersoll Rand Co., 247 NLRB 801 (1980), as urged by Employer as showing the arbitrator's decision was not palpably wrong, appear the more apposite.

There was no specific finding as to lack of deceit being practiced here by the Employer; nor explicit negative as to any determined effort by Employer to undermine the Union, or destroy the bargaining unit found. However, the arbitrator did affirmatively find the thrust of Manager Liverett's 1980 bargaining proposal to be allowed to operate nonunion in Lexington was his candid attempt to deal with the Louisville branch office's (uncontested) deteriorated business base in Lexington; the arbitrator relatedly found facts revealing there was notice given the Union by Manager Liverett of Employer's prospective change of reassignment of the Lexington area to the Cincinnati branch office, known by the Union to be nonunion; and the arbitrator found that the national office's subsequent reassignment of the Lexington area (where its Louisville branch office's competition had been all nonunion) as the national office's attempt to deal with its Louisville branch office's terminal business condition there; an action, the arbitrator found under all the circumstances to be itself not arbitrary, unreasonable, or effecting a discrimination upon Louisville branch office employees. 34

Neither was the matter viewed as one involving waiver issue. In addition to the arbitrator's affirmative findings that Liverett's 1980 proposal (to exclude Lexington) was rejected and never put in the contract, he pertinently ruled:

³⁴ That the Louisville branch office manager had later informed the employees working in Lexington (at P. Lorillard), soon to be laid off by Louisville branch office because of lack of work, of opportunities for their employment in Lexington by the Cincinnati branch office, facts also found by the arbitrator, while not deemed automatic grounds for dismissal of 8(a)(3) allegations as urged by Employer, nonetheless are wholly compatible with the arbitrator's addressment of other facts bearing on union claim of improper Employer motivation.

The reality is that the lack of business in the Lexington area by the Louisville branch office of Pinkerton's, Inc. did not come about because the Union gave up jurisdiction, nor because the Company arbitrarily took their jurisdiction away, nor because this arbitrator is putting his stamp of approval on a company act.

The arbitrator, in effect, refused to declare that the Union's contract negotiated with the Louisville Branch Office had application to the employees then working in Lexington, who were employed by the Cincinnati Branch Office, as had been urged by the Union. Rather, he wholly denied the grievances, finding the contract had not been violated by Employer, after first finding that Louisville Branch Office's business opportunities in Lexington had decreased to a point of realistically being viewed as already gone; that the national office had not acted unreasonably in reassigning Lexington when it did, nor under the above circumstances discriminated against employees employed by the Louisville Branch Office; and that the Cincinnati Branch Office was thereafter able to obtain (increase) business in Lexington because it could compete in Lexington's nonunion business climate, whereas the Louisville Branch Office, over a number of recent years was observed to be unable to do so.

The Board has heretofore addressed similar case circumstances in its consideration of the business activities of "double breasted" company operations of a joint employer, one company being established to seek union business, and another to seek nonunion business opportunties, cf. A-1 Fire Protection, supra. In that case it was found that there was no transfer of bargaining unit work. There was also present no concealment by the employer there, at least later in material time, of the nonunion company's establishment, and operation in the area. It was concluded that the mere increase in nonunion business operation and decrease in union business operation did not warrant inference that there was discrimination practiced against the Union's contract bargaining unit; and that the joint employer did not violate Section 8(a)(5) in its refusal to enlarge the Union's bargaining unit (by applying the union contract to nonunion business operation), on the basis that the union had established no statutory right to represent the employees of the nonunion company.

Here the Union similarly has established no statutory right to represent the employees of the nonunion Cincinnati branch office except to the extent it may successfully lay claim to represent all employees employed in Lexington as a territory on basis of its contract, past practices of the parties and certification(s). But the arbitrator specifically considered each such argument, and he found that the Union's position did not prevail on any of these three elements. Thus the arbitrator clearly found that the Louisville and Cincinnati branch offices had conducted separate operations; and in denying the grievances, the arbitrator obviously declined to extend the Union's contract with the Louisville branch office to the employees employed by the Cincinnati branch office in Lexington, on the basis of the terms of that contract, past practices of the parties, or the Board's certification, for reasons

earlier stated. I need only further address General Counsel's additional contentions as to one of those elements, namely the arbitrator's addressment of the Board's certification, ³⁶ and the twofold contention of the General Counsel that there should be no deferral herein firstly because involved was a representation issue, and a question of appropriate unit; and secondly, that in his consideration of the Board's certification, the arbitrator construed the certification erroneously. I address the latter contention, first.

There is no question that the parties to the arbitration had squarely presented an issue of the import of the Board's certification as a factor to be considered by the arbitrator in resolving the grievances brought under the contract; nor is there question, in light of clear arbitrator addressments thereon, that the arbitrator had stated his view and judgment on the issue of Lexington as claimed "union territory" under the certification. Thus the arbitrator's essentially first stated view was that ". . . that footnote was descriptive of the then extent of the Company business. To read more than that into it would not be realistic. Business changes. Therefore a description of an entity's business is subject to change." Reciting that the Union has argued that the arbitrator must determine whether Lexington was an area covered by, inter alia, the certification, the arbitrator went on to hold, as earlier noted: "With respect to the certification document it is my judgment that the most can be said about the territories or cities named in them is that the Union has jurisdiction to the extent that the Louisville Office continues to have business in them."36

The General Counsel cites no authority for his urged contraconstruction of the certified unit. It is claimed essentially that Employer's employees who work in Lexington, irrespective of by what branch office they are employed, are within the certified unit. The fallacy in the argument would appear to rest in a failure to consider Louisville branch office operation a separate operation. Employer would appear to have overgeneralized also in urging that the scope a certified unit may not in a given case be described by an area, cf. Heating, Piping & Air Conditioning Contractors, 110 NLRB 261, 263 fn. 12 (1954). I need not address other contentions urged by Employer vis-a-vis work assignment. Rather, I address the appropriate unit description in this case, the meaning of which would appear to be sufficiently plain on its face, and confused only by the circumstances found by the arbitrator of the Louisville branch Office decrease in

³⁵ On the matter of contract coverage, it is readily apparent that the arbitrator's finding that the Union's Louisville branch office's contract (and party practices) was not applicable to Cincinnati branch office employees, is supported by record evidence, and concurs with Board precedent, cf. B & B Industries, 162 NLRB 832, 834–835 (1967).

³⁸ The arbitrator also addressed and found a consonant practice. Thus, he found that the Union's members did not enjoy employment in Lexington because that was their territory; that they had enjoyed employment in Lexington because the Louisville branch office of Pinkerton's, Inc. with whom they negotiated was able to successfully bid for business in Lexington; and that someone in the Union would have been employed in other cities (whether or not mentioned in the NLRB certification documents), if the Louisville branch office had been the successful bidder for guard service in them; and that the evidence clearly established that this was the case in many cities in both Kentucky and Indiana.

business, as that of Cincinnati branch office opened and increased.

The appropriate unit for which the Union was last certified is one of all guards of the Employer employed by its Louisville, Kentucky branch office. One need not go further in consideration to resolve the instant matter under consideration. If an employee is not employed by Employer's Louisville branch office either directly, or indirectly, e.g., constructively, by operation of law, by virtue of being only unlawfully employed by some branch office elsewhere as in meritorious unfair labor practice charged, then in my view, the employee is not an employee within the scope of that certified unit. That is the issue that the arbitrator already reached under the contract terms and past practices; and with union (indeed both party) urging, in the light also of the prior Board certification. To be sure the underlying Decision and Direction of Election gave clarification that such employees employed by the Louisville branch office were employed by Louisville were located not just in Louisville, but, inter alia, in Lexington. But the unit description does not say that it covers all of Employer's employees who (may ever) work in Lexington (irrespective of their employment by the Louisville branch office). There is merit in Employer's early argument that it did not describe, nor was the Union here certified as the representative of all of Employer's guards who may work inter alia in Lexington. Though that might have also described an appropriate unit, it is not the unit for which the Union was certified herein. While the arbitrator's overview of the Board's certified unit may have connotations of some oversimplification, on the facts of this case, his findings are essentially consistent with respect to both Board unit principles, as I view it, and, as the arbitrator has found, conformed to party past practices since that certification. I next and last address the General Counsel's contention that the arbitrator's decision should not be deferred to because he has construed a Board certification, and ergo there was a representation issue involved, and an appropriate unit issue on which matters the Board has stated consistently it would not defer.

The General Counsel would rely on cases, e.g., Cannon Air Conditioning Co., 252 NLRB 556, 557 (1980); and Ortiz Funeral Home Corp., 250 NLRB 730 fn. 2 (1980). Apart from Cannon Air involving a Collyer deferral, it was viewed by the Board inter alia, as involving an accretion, id. at 556 fn. 1, and cited, e.g., Williams Transportation Co., 233 NLRB 837, 838 (1977), where the Board said:

The determination of questions of representation, accretion, and appropriate unit do[es] not depend upon contract interpretation but involve[s] the application of statutory policy, standards and criteria. These are matters for decision of the Board rather than an arbitrator.³⁷

The Ortiz Funeral Home case, supra, was held by the Board to involve an issue of representation and appropriate unit. There it was determined by an administrative law judge in review of an earlier unfair labor practice proceeding terminating before another administrative law judge earlier in settlement, that earlier arbitration provided for had not resolved the underlying unit composition issues as anticipated in the arbitrator failing to properly distinguish between office clerical employees and plant clerical employees; and Board's standards for "dual function" employee inclusions, issues resolved by community-of-interest consideration.

A Board certification is a conclusive determination of a bargaining unit. It may be varied only by the Board, or by mutual agreement of the parties, cf. Hunt Brothers Construction, 219 NLRB 177 (1975). While the question whether the existing contract covered employees employed in Lexington by the Cincinnati branch office hired after its effective date would be a proper question for the arbitrator, his decision would clearly not govern an accretion issue. Combustion Engineering, supra.

The Union, however, has never claimed to directly represent employees employed by the Cincinnati branch office; or, pursue claim that it represented the employees recently employed by the Cincinnati branch office and now working in Lexington, as an accretion; but rather has based its claim solely under claim of Lexington being their territory under the contract(s), past practice (considered earlier) and presently pertinently the Board's certification.

Thus no party has sought herein to raise claim of union representation by accretion, nor could it be done effectively on the facts found by the arbitrator, and of record stipulated herein, cf. Hershey Foods Corp., 208 NLRB 452, 457-458 (1974); and Kaiser Foundation Hospitals, 228 NLRB 468, 470 (1977). Neither does this case involve traditional questions of what is the appropriate unit, as may be occasioned by Employer expansion of facilities and/or rival union claims of representation, cf. Marion Power Shovel Co., 230 NLRB 576, 578 fn. 7 (1977);38 nor does it involve similarly transfers of unit work; disputed (new) classifications placement; new plant establishment; or close down and reopen issues. Thus this case does not appear to be one to be disposed of by community-of-interest factors. In short I do not believe the core of this controversy to be as to an issue of appropriateness of unit at all.

The core of the controversy before the arbitrator clearly was one of contended contractual coverage and application with arguments based on contract terms, past practice, and related prior Board certification. The case of the unfair labor practice controversy here, it seems to me, rests on the same territorial claim under the Board's certification, which the arbitrator did address, at prior urging of the parties, has already resolved, in a manner which does not do violence to the construction the Board would actually apply, in my view.

⁸⁷ For development of Board prior deference to arbitrator in representation proceedings, cf. *Raley's Supermarkets*, 143 NLRB 256 (1963), and *Goodyear Tire & Rubber Co.*, 147 NLRB 1233 (1964); and see limitation to one of contract interpretation, exclusive of accretion, e.g., of new plant, *Hershey Foods Corp.*, 208 NLRB 452, 457 (1974); and cf. *Combustion Engineering*, 195 NLRB 909 (1972).

³⁸ In that case the Board observed that the appropriateness of deferring to arbitration depends on the nature of the dispute involved.

It now goes without saying that the Board may, in similar matters at any time invoke "... its superior authority to pass upon and if necessary remedy unfair labor practices." Carey v. Westinghouse Corp., 375 U.S. 261, 272 (1964). But it would appear to me to be parodoxical to do so where, as herein, the arbitrator has already made comprehensive findings that have effectively resolved the unfair labor practices under existing Board precedent in a manner not clearly repugnant to the Act; 39 and in doing so, for the parties, and with colorable warrant to do so in their urging for interpretative coverage of the contract, has in the end construed the certification, in my view, as the Board essentially would construe it.

Finally from the opening statements of the parties made to him, the arbitrator grasped the hard question brought to him, promptly assuring the parties he already felt its burden. He has now resolved the parties complaints and contentions, which in my view parallel the unfair labor practices charged herein, with findings comprehensive of all the mutual concerns the parties had presented and expressed to him in the arbitration proceeding and parties' briefs, in a well-founded opinion and award, one well reasoned, and with judgment based on industrial realism. The issues he was faced with, collectively, parallel the instant unfair labor practices and in making the findings of fact in resolving his contract issues, in my view, there is sufficient indication in his opinion and award that he ruled on all of them, under applicable Board precedent. As the holding of the arbitrator was a narrow one, limited by the unique facts shown as to Lexington, so would be a Board's deferral;

and, as the test is not whether the Board would necessarily have determined the issue as the arbitrator did, but that the arbitrator's decision not be clearly repugnant to the purposes and policies of the Act, nor palpably wrong, neither of which is apparent, I would in the end recommend that the Board defer.⁴⁰

CONCLUSIONS OF LAW

- 1. Pinkerton's, Inc. is an employer within the meaning of Section 2(6) and (7) of the Act.
- 2. Local No. 71, International Guards Union of America is a labor organization within the meaning of Section 2(5) of the Act.
- 3. There is warrant shown by the Employer for the Board to defer, under its *Spielberg* policy of deferral, to the opinion and award of arbitrator David L. Beckman, dated June 22, 1982, which has already resolved the same, or virtually identical issues as are raised in the complaint herein in Case 9-CA-18038.

Based on the foregoing findings of fact and conclusions of law and on the entire record in this proceeding, I issue the following recommended⁴¹

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and hereby is, dismissed in its entirety.

³⁹ See also *The Liberal Market*, 264 NLRB 807 (1982). Here the facts found by the arbitrator relatedly do not portray a transfer of Louisville branch office bargaining unit work, but essentially the national office's resolution of the question given the prevailing business conditions in Lexington, and Louisville office failure, of whether the Employer was going to seek to do business in Lexington at all.

⁴⁰ I have carefully considered the supplemental evidence offered by the parties and I find nothing therein presented to persuade to finding the unfair labor practices raised herein were not previously presented and considered, or insufficiently indicated ruled on by the arbitrator under the considered Board precedent.

⁴¹ If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.